Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

DAN W. WEBB,

Petitioner,

v.

A B CHANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I, Petitioner, on behalf of my client, United Capitol Insurance Company ("United Capitol"), filed a claim for strict liability under § 402A of the Restatement (2d) of Torts against Pontotoc Electric Power Association ("PEPA") for the faulty assembly and installation of fuses on a transformer bank. PEPA filed a third party complaint against the manufacturer of the fuse components, A. B. Chance Company, Inc. ("Chance"), over my objection; I was not claiming defect in the fuse components. The district court allowed the third party complaint. After United Capitol lost at trial, Chance moved for sanctions against me, for filing the § 402A claim, even though I had not filed a claim against Chance or its products. The district court granted sanctions against me. On motion for reconsideration, I presented proof that I had never filed a claim against Chance or its products, including the sworn affidavit of United States Magistrate Judge Jerry A. Davis, who oversaw discovery in the case. The district court refused to consider the evidence, and issued its final order on sanctions. The Fifth Circuit affirmed, but only after striking references to Magistrate Judge Davis' affidavit and other proof in the record showing that sanctions were not warranted.

I. Do the Fifth Circuit's rulings: 1) upholding the district court's imposition of sanctions, and 2) striking references to the affidavit of United States Magistrate Judge Jerry A. Davis and other evidence contained in the record and properly before the district court for consideration, violate due process by depriving the petitioner of a meaningful opportunity to be heard on the dispositive issue of whether the petitioner filed any claim against the respondent, and do the Fifth Circuit's rulings depart from sound judicial reasoning and common sense?

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The opinion of the Fifth Circuit in *United Capitol Ins. Co. v. Pontotoc Electric Power Association v. A. B. Chance Co., Inc. v. Dan W. Webb,* Cause No. 99-60080, is set forth in the Appendix hereto (App. 1a).

The order of the Fifth Circuit granting the Respondent's Motion to Strike the Affidavit of United States Magistrate Judge Jerry A. Davis is unreported and set for in the Appendix hereto (App. 5a).

The first interlocutory order on sanctions of the District Court for the Northern District of Mississippi in *United Capitol Ins. Co. v. Pontotoc Electric Power Association v. A. B. Chance Co., Inc. v. Dan W. Webb*, Cause No. 3:91-19-B-D, is unreported and set forth in the Appendix hereto (App. 22a).

The second interlocutory order on sanctions of the District Court for the Northern District of Mississippi in *United Capitol Ins. Co. v. Pontotoc Electric Power Association v. A. B. Chance Co., Inc. v. Dan W. Webb*, Cause No. 3:91-19-B-D, is unreported and set forth in the Appendix hereto (App. 18a).

The third interlocutory order on sanctions of the District Court for the Northern District of Mississippi in *United Capitol Ins. Co. v. Pontotoc Electric Power Association v. A. B. Chance Co., Inc. v. Dan W. Webb*, Cause No. 3:91-19-B-D, is unreported and set forth in the Appendix hereto (App. 15a).

The fourth interlocutory order on sanctions of the District Court for the Northern District of Mississippi in *United Capitol Ins. Co. v. Pontotoc Electric Power Association v. A. B. Chance Co., Inc. v. Dan W. Webb*, Cause

No. 3:91-19-B-D, is unreported and set forth in the Appendix hereto (App. 12a).

The final order on sanctions of the District Court for the Northern District of Mississippi in *United Capitol Ins. Co. v. Pontotoc Electric Power Association v. A. B. Chance Co., Inc. v. Dan W. Webb*, Cause No. 3:91-19-B-D, is unreported and set forth in the Appendix hereto (App. 9a).

The order of the District Court for the Northern District of Mississippi denying the Petitioner's Motion to Correct the Record in *United Capitol Ins. Co. v. Pontotoc Electric Power Association v. A. B. Chance Co., Inc. v. Dan W. Webb*, Cause No. 3:91-19-B-D, is unreported and set forth in the Appendix hereto (App. 6a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court for the Northern District of Mississippi was entered on October 2, 2000. The Fifth Circuit denied the Petition for Rehearing En Banc, or, in the Alternative, for Panel Rehearing on December 7, 2000. This Petition for writ or certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Sec.1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

> United States Constitution, Amendment V:
> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .
>
> United States Constitution, Amendment XIV, Section 1:
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Judiciary and Judicial Procedure–Fees and Costs–28 U.S.C. Section 1927. Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Federal Rules of Civil Procedure, Rule 11 [the version prior to the 1993 amendments]:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified by or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by

corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention to the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

STATEMENT OF THE CASE

I have been sanctioned based upon the actions of my *opponent*–for failing to collect evidence to support a claim I never made, at the behest of a party I never sued[1].

On February 7, 1989, one of the buildings of Washington Furniture Factory in Pontotoc County, Mississippi, burned to the ground. (R. p. 2)[2]R.E. p. denotes "Page _ of the Record Excerpts submitted to the Fifth Circuit". As attorney for United Capitol Insurance Company, the plaintiff in a subrogation claim, I brought a claim against the Defendant, Pontotoc Electric Power Association ("PEPA"), under an alternative theory of strict liability under § 402A of the Restatement (Second) of Torts, for the improper assembly and installation of transformer fuses for the transformer bank providing power to Washington Furniture Factory. (R. p. 323-27). The only entity against whom I made a claim was PEPA. (App. 30a-32a).

Over my objection, PEPA filed a third-party complaint against the manufacturer of some of its fuse components, A. B. Chance Company ("Chance"). (R.p. 414, App. 30a-32a). At the hearing before United States Magistrate Judge Jerry A. Davis on PEPA's motion to bring Chance into the litigation, I explained to lead counsel for PEPA that it could not bring Chance into the litigation based upon our Complaint–that if it brought Chance in, it did so based upon its own, independent knowledge. (App. 30a-32a). Magistrate Judge Davis submitted an affidavit

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[1]First-person references, such as "I" and "me" refer to the Petitioner. "Chance" refers to the Respondent.

[2]Citations to various sources are denoted throughout as follows:
App. _a denotes "Page _ of the Appendix to the Petition for Certiorari"
R. p. _ denotes "Page _ of the Record on Appeal"
S.R.p. _ denotes Page _ "Supplemental Record on Appeal"

verifying that I never made any claim against A. B. Chance and that I informed lead counsel for PEPA of that fact. (App. 30a-32a). Nevertheless, PEPA drew Chance into the litigation. (R. p. 414). *I never brought any claim whatsoever against Chance or any of its products.* (App. 30a-32a).

After my client lost the subrogation case, Chance moved for sanctions against me, for filing the § 402A strict liability claim. (R. p. 3541). The motion for sanctions appeared absurd to me, as I, on behalf of my client, had sued PEPA, not Chance. (App. 30a-32a, R. p. 323-27). In fact, I had even cautioned PEPA against bringing its third party claim against Chance–and had done so before the court. (App. 30a-32a). Thus, under Rule 11, Section 1927 or any other method available, Chance simply had no standing to seek sanctions against me–and no basis upon which to assert sanctions. If Chance had any grievance at all, then it should have leveled sanctions against PEPA, the entity who brought the claim, not me. The clerk placed all of my original exhibits to my response to the Motion for Sanctions in the chambers of the trial court, rather than making them a part of the record, as should have happened.

In the first of four interlocutory orders regarding sanctions, the trial court granted Chance's motion for sanctions, based solely on the erroneous conclusion that the § 402 A claim was against Chance. (App. 24a, 27a). *The trial court's order stating that I would be sanctioned was my first notice that the court had misunderstood my claim.* I immediately moved for reconsideration; I presented evidence, including the affidavit of United States Magistrate Judge Jerry A. Davis, proving that I had never made any claim against any Chance product, and completely exonerating me of any wrongdoing. (App. 30a-32a). The trial court refused to consider any of that evidence, thus depriving me of any meaningful opportunity to be heard on that issue. (App. 16a, 21a).

The trial court issued its final order on sanctions–in which it determined the type and the amount of the sanction.

(App. 9a). I timely filed a Notice of Appeal, listing, among other issues, the trial court's failure to consider Magistrate Judge Davis' affidavit. (S.R. p. 12). During the briefing process, I noticed that the exhibits to my Response to the Motion for Sanctions were missing from the Record on Appeal. I moved both the Fifth Circuit and the trial court to correct the record, but both refused. (App. 6a). Also during the briefing process, Chance moved to strike references to Magistrate Judge Davis' affidavit. I responded, but the Fifth Circuit struck references to the affidavit; this decision again deprived me of a meaningful opportunity to be heard on the issue of the trial court's failure to consider the evidence properly before it. (App. 5a). The Fifth Circuit's decision removed from consideration the very evidence I had presented to demonstrate the trial court's error. (App. 30a-32a).

The Fifth Circuit then affirmed the trial court's ruling–after having stricken relevant evidence that I had properly presented to the trial court prior to multiple orders from which I appealed–and after having refused to correct the Record on Appeal with the original documents I submitted in response to the Motion for Sanctions. In other words, the Fifth Circuit ruled on whether the trial court had committed reversible error–but did so only after striking the evidence showing that error. Finally, the Fifth Circuit cloaked its surprising and unique decision in a *per curiam*, unpublished opinion, in an apparent effort to shield that decision from appellate review.

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S RULINGS: 1) UPHOLDING THE DISTRICT COURT'S IMPOSITION OF SANCTIONS, AND 2) STRIKING REFERENCES TO THE AFFIDAVIT OF UNITED STATES MAGISTRATE JUDGE JERRY A. DAVIS AND OTHER EVIDENCE CONTAINED IN THE RECORD AND PROPERLY BEFORE THE DISTRICT COURT FOR CONSIDERATION, VIOLATE DUE PROCESS BY DEPRIVING THE PETITIONER OF A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE DISPOSITIVE ISSUE OF WHETHER THE PETITIONER FILED A CLAIM AGAINST THE RESPONDENT, AND VIOLATE SOUND JUDICIAL REASONING AND COMMON SENSE.

To put the issue into its simplest terms, the ruling of the Fifth Circuit simply does not make sense. I have been sanctioned for the unilateral action of my *opponent*, even though the uncontradicted record clearly shows that I counseled my opponent against taking the very action leading to the sanctions. (App. 30a-32a). No court in the nation has imposed sanctions in this way. The imposition of sanctions must comport with the dictates of due process. Chambers v. Nasco, Inc., 501 U.S. 32 (1991), Roadway Express v. Piper, 447 U.S. 752 (1980). Due process requires, at a minimum, fair notice and a reasonable opportunity to be heard. Id. As to attorney disciplinary proceedings, "The Fourteenth Amendment's Due Process Clause 'insists that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985). I had absolutely no notice that I could be sanctioned for the unilateral action of my adversary–namely, my adversary's act of filing a third-party complaint against A. B. Chance. Further, I had no idea the trial court misunderstood what claim I brought

(against Pontotoc Electric, my adversary)–until the trial court made its initial interlocutory ruling on sanctions. Thus, the "notice" came after the sanction; for that reason it was no notice at all. Such a total lack of notice violates due process under the clear law set forth by the this Court. See Chambers, Roadway, and Zauderer, *infra*.

The sole basis for the trial court's order granting sanctions–and thus, the Fifth Circuit's affirmance–was that I had asserted a claim against A. B. Chance fuse components and then "recharacterized" that claim once sanctions were imposed. (App. 24a, 27a). The Fifth Circuit has stricken references to the Affidavit of United States Magistrate Judge Jerry A. Davis–and then issued an Order which left the Record on Appeal incomplete. (App. 5a). The affidavit and handwritten notes of Magistrate Judge Davis provide the strongest proof of what the § 402 A claim in the Second Amended Complaint was–and that it was against *PEPA*, not Chance:

> 5. During the course of the meeting, I specifically asked Dan Webb, one of the attorneys for United Capitol Insurance Company, *whether any claims being made in the proposed amended complaint by United Capitol was for the purpose of asserting any claim against A. B. Chance.*
>
> 6. *I specifically recall that Mr. Webb advised the court at that time that no such claim was being made.*
>
> 7. I also recall that Mr. Webb went on to explain at that time that *United Capitol's claim for defective fuses was based entirely on what PEPA had done and what it had put upon the transformer bank.*
>
> . . .
>
> 10. It was only after this meeting that I signed an order allowing both the amendment to the complaint, *and as a result of the desires*

> *of PEPA, the filing of the third party complaint which was against A.B. Chance.*
> 11. *Mr. Webb advised both the court and all those present* at the date of this conference, which was before the amended complaint, which is the subject of the motion for sanctions, and the third party complaint were filed, *that the proposed amended complaint did not allege any claim based on any A.B. Chance product.*
> 12. *This statement was made to the court and in front of all counsel present which included* [lead counsel for PEPA].
> 13. I understood at that time that Mr. Webb took the position on behalf of his client that *no claim against any A.B. Chance product was being made as a basis for any product liability claim in this case.*

(App. 30a-32a) (April 9, 1998 affidavit of Magistrate Judge Jerry Davis). Compare the unequivocal sworn statements above with the language of the trial court's initial order on sanctions:

> The attorneys for United filed a second amended complaint alleging defective fuses. Despite United' counsels' attempts to recharacterize their claims, the second amended complaint clearly asserts a claim for defective fuses.[2]

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[2]Counsel for United maintains that they never claimed any defect in the Chance fuses, but rather that the transformer was defectively fused in that there were no fuses or that the wrong fuses were used. However, the second

> amended complaint, in asserting a claim for strict liability, clearly states that the fire was caused by "defective transformer fuses" which unambiguously assert that the correct fuses were used but that there was a manufacturing or design defect that caused the fuses not to function properly.

(App. 24a, 27a). The trial court not only contradicted the clear sworn statement of its own Magistrate Judge who attended the hearing on this issue, it clearly misunderstood our claim and misapplied Mississippi law regarding § 402A of the Restatement (2d) of Torts. We found that it is certainly a viable theory that by incorporating improper components into a finished device, a company is deemed a seller of the defective component as contemplated by § 402A of the Restatement (Second) of Torts. See Coca Cola Bottling Co. v. Reeves, 486 So.2d 374, 378 (Miss. 1986); see also Ford Motor Co. v. Mathis, 322 F.3d 267, 273 (5th Cir. 1963); Baughman v. General Motors Corp., 627 F.Supp. 871 (D.S.C. 1985), State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966); Olson v. Ulysses, 649 F.2d 1511 (D. Kan 1986).

I ask the Court to keep in mind that the *sole* basis for Chance's sanctions claim is that I made a claim under § 402 A *against Chance* for the manufacture of defective fuse components. (App. a). I never made any such claim, and Magistrate Judge Davis' affidavit proves that beyond doubt– and that the third-party plaintiff, PEPA, knew that fact before bringing Chance in.

How could the Fifth Circuit, the trial court, or any court find that I pressed a claim of any kind against Chance or its products in the face of this sworn oath of a federal judge? Certainly the Fifth Circuit's inquiry should have ended upon reading the sworn oath of Magistrate Judge Davis, as one of my issues on appeal was:

ISSUE IV.

Whether the sanctions orders should be vacated because the District Court abused its discretion in concluding that there was no reasonable basis upon which to allege the alternative theory of strict liability against the Defendant as assembler of the component parts of transformer fuses and in *failing or refusing to consider, inter alia, facts in the record including the affidavit of the United States Magistrate Judge affirming that no claim was made against any product designed or manufactured by the party joined by the Defendant as a third party?*

(S.R. p. 12) (Appellant's Statement of Issues for Appeal). The trial court signed its final order on sanctions on January 22, 1999; I submitted Magistrate Judge Davis' affidavit on April 22, 1998. Eight months before that, and my co-counsel, J. Max Edwards submitted the same affidavit on June 26, 1998, also long before the trial court's final order. This affidavit was in the record multiple times prior to the trial court's final order on sanctions, and the trial court's refusal or failure to consider it was one of my Issues on Appeal. The Magistrate Judge's affidavit was properly before the trial court–and properly before the Fifth Circuit, and the Fifth Circuit's refusal to consider Magistrate Judge Davis' affidavit violates due process by depriving me of an opportunity to be heard on this dispositive issue.

How could I possibly prove error by the trial court in refusing to consider Magistrate Judge Davis' affidavit–if the Fifth Circuit Court would not allow me to refer to the affidavit? The Fifth Circuit–in striking references in my briefs to Magistrate Judge Davis' affidavit–effectively struck one of my issues on appeal, thus depriving me of any opportunity to be heard on that issue. Refusal to consider the Magistrate Judge's supplementation of the record also

violates prior precedent in the Fifth Circuit. Kipps v. Caillier, 197 F.3d 765 (5th Cir., December 6, 1999). In Kipps, the Fifth Circuit vacated sanctions because the district court ignored the findings of its own magistrate, just as the district court did in the present case.

The Fifth Circuit has also violated due process by: 1) rendering its decision on an incomplete record, and 2) explicitly removing references to relevant portions of the Record on Appeal from my briefs–effectively removing any meaningful opportunity for me to be heard on the dispositive issue in this case–the nature of the claim for which I was sanctioned. Due process requires both notice and a meaningful opportunity to be heard; only through due process can a tribunal arrive at the truth behind a controversy or claim. Had the Fifth Circuit or the trial court conformed to the dictates of due process–by providing notice and a meaningful opportunity to be heard on the legal issue of what my claim was–I never would have been sanctioned. First, as Chance admitted during oral argument, I never filed any pleading against Chance or any of its products. Further, I did not have notice of the trial court's total misunderstanding of my claim until the trial court issued its first interlocutory order on sanctions–an order based upon the clearly erroneous determination that I had made a claim against A. B. Chance. The trial court's decision to impose sanctions boils down to one dispositive issue: What claim did I bring under § 402A of the Restatement (Second) of Torts–and against whom did I bring it–in the Second Amended Complaint? As neither the Fifth Circuit nor the trial court would consider the dispositive evidence supporting my defense to sanctions, the sworn oath of a federal judge involved in the case, I have not been afforded a meaningful opportunity to be heard on this issue–and, thus, the Fifth Circuit has violated my right to due process.

The Fifth Circuit's holding stands alone, unique among the Circuits and contrary to the Federal Rules of Civil Procedure, which have been adopted by this Court. A. B.

Chance had no standing to seek sanctions against either me or my client in this case. Chance was a *third-party defendant*–brought into this case at the stubborn insistence of the first-party defendant, Pontotoc Electric Power Association. (R.p. 414, App. 30a-32a). My client, United Capitol Insurance Company was the *Plaintiff*, and, *as Chance admitted during oral argument, we filed no pleading asserting any claim against Chance or any of its products.* No reported case in America has held that a party situated as Chance may sanction counsel situated as I was–because we were not opponents. The drafters of Rule 11 clearly stated that sanctions would be appropriate if the actions of one's *opponent* were not well-grounded in fact or in law: "The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose *opponent* acts in bad faith in instituting or conducting litigation." F.R.C.P. 11, Advisory Committee Notes, 1983 Amendment. In this case, A. B. Chance was clearly not United Capitol's opponent; A. B. Chance was PEPA's opponent (with PEPA as the third party plaintiff and A. B. Chance as the third party defendant). Thus, the Fifth Circuit's holding stands contrary to the Federal Rules of Civil Procedure, as adopted by this Court–and is the only decision allowing an attorney to be sanctioned based–not upon his own actions–but upon the actions of his *opponent*. As the trial court's ruling and the Fifth Circuit's affirmance are contrary to the established law regarding sanctions, the imposition of this new rule–totally unsupported in the law–violated due process, as I had no way to know such a rule existed–and, thus, had no notice.

To conclude, the Fifth Circuit's decision to uphold sanctions against me, and the way the Fifth Circuit arrived at that decision, violate due process, sound judicial principles, and common sense. I have been sanctioned for the unilateral conduct of my opponent, for failing to collect evidence to support a claim I never made, at the behest of a party I never

sued. Every time I have attempted to present evidence to prove what my claim really was, the court has either refused to consider that evidence (as did the district court), refused to correct the record to include that evidence (as did both the district court and the Fifth Circuit), or stricken references to that evidence (as did the Fifth Circuit). Finally, the Fifth Circuit has shielded its decision from scrutiny by rendering an *per curiam* unpublished opinion. I ask simply that the evidence supporting my position be brought into the light of day. so that I may obtain the due process required under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit, and ultimately, to vacate and reverse the sanctions order below.

Respectfully submitted,
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(Any footnotes trail end of each document)

No. 99-60080

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant – Appellee/Cross-Appellant,

VERSUS

DAN W WEBB,
Appellant/Cross Appellee.

Appeal from the United States District Court For the
Northern District of Mississippi

(3:91-CV-19-B)

FILED October 02, 2000

Before KING, Chief Judge, REYNALDO G. GARZA and PARKER, Circuit Judges.

PER CURIAM:*

Dan W. Webb ("Webb") appeals a sanctions order imposed by the district court. A. B. Chance Company ("Chance") cross appeals, asserting that the sanctions ordered were insufficient. We affirm.

This case arises from an action by United Capitol Insurance Company ("United") against Pontotoc Electric Power Association ("PEPA") to recover payments made to Washington Furniture Manufacturing Company ("Washington") when a fire damaged one of Washington's warehouses. In its second amended complaint, United alleged that "the failure of the transformer fuses to blow when confronted with an electrical malfunction was caused by defective transformer fuses provided and installed by [PEPA] in the delivery of electrical service to the Plaintiff . . . ." PEPA then filed a third-party complaint seeking indemnification against Chance, the manufacturer of all fuselinks used by PEPA in the warehouse. Prior to trial, United withdrew its allegation of defects in the fuselinks and the district court dismissed Chance as a third-party defendant with prejudice, but carried Chance's motion for sanctions against United until the conclusion of the case. The case went to trial and the jury returned a general verdict for defendants.

On October 21, 1997, the district court issued an order granting Chance's motion, finding that United's counsel had violated Federal Rule of Civil Procedure 11 by filing the second amended complaint with no evidentiary support for its faulty fuse claim. Further, the district court found that United's counsel violated 28 U.S.C. § 1927 by filing the second amended complaint and "in refusing to dismiss the claims of defective fuses despite Chance's request to do so." The court stated that United's counsel's response to the sanctions motion demonstrated "the propensity of United's counsel to unreasonably and

vexatiously multiply the litigation." The court further determined that United's attorneys "should pay Chance's reasonable attorneys' fees and expenses incurred because of United's frivolous claim for defective fuses," but did not determine the amount of the sanctions.

On January 22, 1999, the district court ordered Webb and his associate J. Max Edwards to take six hours of Continuing Legal Education in ethics within twelve months. In addition, the court fined Webb $7,500.00, to be submitted to counsel for Chance within thirty days. Webb appealed, asserting that he should not have been sanctioned at all. Chance cross appealed, arguing that the $7,500.00 sanction was inadequate because it had incurred actual fees and expenses exceeding $100,000.

We review the imposition of sanctions under either 28 U.S.C. § 1927 or Rule 11 for an abuse of discretion. Conner v. Travis County, 209 F.3d 794, 799 (5th Cir. 2000) (28 U.S.C. § 1927) Thornton v. General Motors Corp., 136 F.3d 450, 454 (5th Cir. 1998) (Rule 11). The record, the briefs and the argument of counsel reveal no abuse of discretion in the imposition of sanctions or in their amount. We therefore affirm the orders of the district court.

Chance's motion for additional sanctions against Webb, based on allegations that he abused the appeal process, is denied. Chance's motion for damages and costs in accordance with Federal Rule of Appellate Procedure 38 is denied. Chance's motion for attorney's fees on appeal is denied.

AFFIRMED. Motions for sanctions, damages, costs and attorney's fees DENIED.

FOOTNOTES

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

No. 99-60080

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant – Appellee/Cross-Appellant,

VERSUS

DAN W WEBB,
Appellant/Cross Appellee.

ORDER

Filed 11/12/99

IT IS ORDERED that the motion of appellee-cross-appellant, AB Chance Company to strike all references to Magistrate Judge Davis' affidavit of April 4, 1998 from appellant's brief, as well as all related motions and filings is GRANTED

CARL E. STEWART
UNITED STATES CIRCUIT JUDGE

No. (3:91-CV-19-B)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant,

FILED December 16, 1999

ORDER

This cause comes before the court upon motion of Dan Webb to correct the record. Upon due consideration of the motion, and response thereto, the court is of the opinion that this motion is not well taken and should be denied.

Dan Webb, the appellant/cross appellee in the above styled and numbered cause, brought his motion to correct the record pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure.[1] Mr. Webb contends that on or about June 18, 1997 he submitted, either to the office of the court clerk or to the court, a response to a motion for sanctions. Mr. Webb further alleges that attached to this response were

original exhibits, designated as exhibits "A" through "EE" in support thereof Mr. Webb subsequently appealed this matter to the Fifth Circuit and the supplemental record related thereto was transmitted on March 30, 1999. The matter is currently pending before the Fifth Circuit. Mr. Webb now seeks to supplement the record by the addition of over 30 exhibits over the objections of opposing counsel. He has shown no evidence of the materiality of these exhibits as necessitated by Rule 10(e)(2). Further, although Mr. Webb has stated that supplementation of these exhibits would not prejudice other parties, it appears that at this late date the other parties no longer have the right to provide additional briefs regarding this matter. Therefore, they may prejudiced by the requested supplementation of the record. The court thus finds that Dan Webb's motion to correct the record should be denied.

Accordingly, it is so ORDERED, that Dan W. Webb's motion to correct record shall be DENIED.

THIS, the 16 day of December, 1999.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

FOOTNOTES

[1]Rule 10(e) of the Federal Rules of Appellate Procedure states as follows:

(a)Correction Or Modification Of The Record

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2)If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A)on stipulation of the parties;

(B)by the district court before or after the record has been forwarded; or

(C)by the court of appeals.

(3)All other question about the form and content of the record must be presented to the court of appeals.

No. (3:91-CV-19-B)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant,

FILED January 25, 1999

ORDER

This cause comes before the court upon the motion of A.B. Chance for sanctions. By order dated October 21, 1997, this court found that Dan W. Webb and J. Max Edwards, Jr., were guilty of filing an amended complaint asserting a claim for defective fuses without sufficient basis to support such a claim. The underlying facts were recited in the court's order of October 21, 1997, and will not be repeated herein. The sole remaining issue facing the court is what sanctions are appropriate.

The court has considered a number of alternatives regarding the issue of sanctions. One alternative that has been

considered is to require the offenders to pay all of the legal fees and expenses of the third-party defendant, A.B. Chance, who was brought into this case as a result of the offenders' sanctionable conduct. However, certain factors mitigate against requiring Webb and Edwards to pay the legal fees of A.B. Chance. Perhaps the most significant factor is that United Capitol did not actually file any cause of action directly against A.B. Chance, though its actions, through its attorneys Webb and Edwards, did lead to A.B. Chance being brought into the suit by Pontotoc Electric Power Association. Another mitigating factor is that the legal fees and expenses claimed by A.B. Chance are exorbitant and could possibly bankrupt the offenders if they were required to pay them. In determining the appropriate sanction, the court should seek a penalty that will adequately punish the offenders and deter future sanctionable conduct without causing unreasonable financial hardships on the offenders and their families.

Accordingly, after much consideration, it is ordered that Webb and Edwards are each required to take 6 hours of Continuing Legal Education in the field of ethics within the next twelve months. This requirement is in addition to any Continuing Legal Education annually required by the Mississippi Bar Association. After completing the required hours, Webb and Edwards are directed to provide appropriate documentation to the court to show that the requirements have been completed. Furthermore, Dan Webb is ordered to pay a fine of$7,500.00, to be submitted to counsel for A.B. Chance within thirty days of the date of this order.[1]

And it is so ORDERED, this, the 22 day of January, 1999.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

FOOTNOTES

[1]The court finds that at the time of the egregious conduct, Edwards was a young associate working under the direct supervision of Webb, and therefore should not be subject to a financial penalty.

No. (3:91-CV-19-B)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant,

FILED October 30, 1998

ORDER

This cause comes before the court upon the motion of A.B. Chance for sanctions. By order dated October 21, 1997, this court found that Dan W. Webb and J. Max Edwards, Jr., were guilty of filing an amended complaint asserting a claim for defective fuses without sufficient basis to support such a claim. Subsequent thereto, Edwards moved to set aside the court's order on the grounds that he had no notice of the motion for sanctions and therefore had had no opportunity to respond. Edwards, who had been an associate working under the supervision of Webb at the time of the conduct complained of herein, had since left Webb's firm to join another. Chance's motion for sanctions, which did not

specifically seek sanctions against Edwards, was served only upon Webb as counsel of record for United Capitol at the time the motion was filed. Webb filed a response to Chance's motion; however, since the court decided that sanctions against Edwards, personally, were appropriate, the court felt it reasonable to allow Edwards an opportunity to file his own response before sanctions were implemented. Edwards has now filed his response and the court is ready to proceed.

The underlying facts were recited in the court's order of October21, 1997, and will not be repeated herein. Upon due consideration, the court finds that its order issuing sanctions against Edwards should stand. The issue of sanctions has been analyzed ad nauseam by the court in its previous rulings entered in this case. Simply put, Webb and Edwards signed an amended complaint in which they asserted, on behalf of United Capitol, a claim of strict liability for defective fuses. However, neither Webb nor Edwards ever had any basis for asserting such a claim. In support of his position, Edwards contends that the opinion of his expert witness, John Butters, provided sufficient basis to assert a claim for defective fuses and he has submitted both a formal report and an affidavit of Butters to support his contention. Butters' report, dated February 18, 1993, memorializing an oral opinion given earlier to Webb and Edwards, states that:

> [t]he precise mode of failure of the A.B. Chance fused disconnects is unknown at this time but could have been the result of improper fusing of the disconnects or the failure of the disconnects or their fuse links to function properly due to defects.

Butters' affidavit, drafted in response to Chance's motion for sanctions, states that:

> the subject fire...had to have either been caused by

> negligent, or otherwise improper fusing of the electrical service system, or defective fuses, or both....

Neither the affidavit nor the formal report of Butters ever states an opinion upon which a reasonable charge could have been based. Butters has never identified a specific defect in either the fuse or any portion of the fuse assembly. Butters report specifically states that the precise mode of failure of the Chance fused disconnects is unknown but it could have been the result of defective fuses. This is insufficient to support a charge of defective fuses and accordingly, the court finds that sanctions against Edwards are appropriate.

It is therefore ORDERED, in accordance with the court's previous order dated October 21, 1997, that J. Max Edwards, Jr., is guilty of violating both Fed. R. Civ. P. 11(b) and 28 U.S.C. § 1927. The court will determine the appropriate sanction at a later date.

THIS, the 30 day of October, 1998.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

No. (3:91-CV-19-B)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant,

FILED June 12, 1998

ORDER

This cause comes before the court upon the motion of A.B. Chance to dismiss Max Edwards from the sanctions proceedings. Upon due consideration, the court finds that the motion should be denied.

The court has previously stated that it would accept an agreed order from the parties in which Edwards is relieved of any obligation imposed under the court's order of October 21, 1997, issuing sanctions against Dan Webb and Max Edwards, provided that any such agreed order contained an affirmation that Webb would be personally responsible for all

sanctions ultimately decided upon by the court. The parties have failed to submit such an agreed order. Instead, A.B. Chance has moved to dismiss Edwards on the ground that it never intended to seek sanctions against Edwards. Webb has joined in the motion to dismiss Edwards, but does not agree that Edwards may be dismissed simply upon the request of A.B. Chance. Rather Webb attempts to use the motion of A.B. Chance, as an opportunity to argue the merits of the sanctions for a third time. Since Webb has had two previous occasions to argue the merits of the sanctions, the court finds that any portion of Webb's briefs or exhibits which attempt to address the issue of whether or not sanctions should be awarded shall not be considered by the court.

Since the motion by A.B. Chance does not comply with the court's previous requirements for an agreed order, the court finds that the motion to dismiss should be denied. However, the court states that it will grant a motion to dismiss Edwards if A.B. Chance advises the court that Edwards' actions were not sanctionable.

The court's order dated March 23, 1998, allowed Edwards fifteen days in which to file a formal response to A.B. Chance's motion for sanctions. Apparently Edwards and A.B. Chance agreed among themselves that Edwards would be allowed to delay his response to the motion for sanctions until such time as the court ruled upon the motion to dismiss. However, the court has not agreed to extend Edwards' time to file a response, nor has the court approved of the parties' agreement to disregard the Federal Rules of Civil Procedure. Nevertheless, the court will grant Edwards ten days from the date of this order in which to file his response to A.B. Chance's motion for sanctions. The court admonishes the parties to remember that any extensions of time, even if agreed among the parties, require court approval. Failure to obtain court approval for an extension of time could result in the court's failure to consider an untimely response.

Accordingly, it is ORDERED:

that the motion of A.B. Chance to dismiss Max Edwards from the sanctions proceeding is DENIED; and

that Max Edwards has ten (10) days from the date of this order in which to file his response to A.B. Chance's motion for sanctions.

THIS, the 12 day of June, 1998.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

No. (3:91-CV-19-B)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant,

FILED March 24, 1998

ORDER

This cause comes before the court upon the motion of Max Edwards to modify or set aside the court's order of October 21, 1997, the motion of Dan Webb for reconsideration of the court's order of October 21, 1997, and Steve McDavid's affidavit of fees and expenses. Upon due consideration of the voluminous memoranda and exhibits, the court is ready to rule.

By order dated October 21, 1997, the court found that Dan Webb and Max Edwards had signed an amended complaint on behalf of United Capitol Insurance Company in

which they asserted a claim for defective fuses, when they had no evidentiary support for such an allegation, contrary to the mandate of Fed. R. Civ. P. 11(b) and 28 U.S.C. § 1927. The court further found that an appropriate sanction would be for Webb and Edwards to pay A.B. Chance's reasonable attorney's fees and expenses incurred because of United Capitol's unfounded charge of defective fuses. Eckiards now files his motion to modify or set aside the sanctions order on the grounds that he was never served with such a motion, and therefore, never had the opportunity to respond on his own behalf. The response to A.B. Chance's motion for sanctions was filed by Webb, with no input from Edwards.

The court agrees that Edwards is entitled to notice and an opportunity to be heard. Since Edwards now has notice of the motion for sanctions, the court finds that he should be given fifteen days in which to file a formal response. In the alternative, the court will accept an agreed order signed by Webb, Edwards, and McDavid in which Edwards is relieved of any obligation under the court's prior ruling, if the agreed order reflects Dan Webb's consent to be personally responsible for all sanctions ultimately decided upon by the court.

In regard to Dan Webb's motion for reconsideration, the court finds that Webb has failed to present any newly discovered evidence in his motion for reconsideration[1] and all issues of law raised by Webb were previously considered by this court in issuing its earlier ruling. See Waltman v. International Paper Co., 875 F.2d 468, 473 (5th Cir. 1989) (motion for reconsideration serves the narrow purpose of allowing a party to correct manifest errors of law or to present newly discovered evidence). Therefore the court finds that Webb's motion for reconsideration should be denied.

In its original order, the court instructed the parties to attempt to reach an agreement as to the exact amount of fees

and expenses due, and that if the parties could not agree, counsel for A.B. Chance was to submit an affidavit as to its fees and expenses. McDavid has submitted an affidavit on behalf of A.B. Chance, but the documents supporting the amount of fees and expenses requested were filed under seal, and were not served upon opposing counsel. It is impossible for Webb and Edwards to adequately respond to McDavid's affidavit of fees and expenses without the time sheets of A.B. Chance. Therefore, the court finds that counsel for A.B. Chance should immediately serve upon Webb and Edwards the document submitted as exhibit "D" to McDavid's affidavit of fees and expenses.

Accordingly, it is ORDERED:

that Max Edwards is GRANTED fifteen days in which to file a formal response to A.B. Chance's motion for sanctions, or in the alternative, to submit an agreed order in which Edwards is relieved of any obligation imposed under the order of October 21, 1997, provided that any such agreed order contains an affirmation that Webb will be personally responsible for all sanctions ultimately decided upon by the court;

that Dan Webb's motion for reconsideration is DENIED; and

that Steve McDavid shall immediately serve upon Dan Webb and Max Edwards all documentation in support of McDavid's affidavit of fees and expenses, including the documents attached to said affidavit as exhibit "D", which were previously submitted to the court for in camera review.

THIS, the 23 day of March, 1998.

NEAL B. BIGGERS JR.

UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] Webb has submitted additional affidavits in support of his motion for reconsideration, but has failed to explain why the affidavits were not submitted in support of his initial response to the motion for sanctions. Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990) (where a party, on motion for reconsideration, seeks or submits new evidence, the party must advance reasons for its failure to present such evidence on the previous briefing).

No. (3:91-CV-19-B)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant,

FILED October 22, 1997

ORDER

This cause comes before the court upon the motion of A. B. Chance Company ("Chance"), for sanctions against United Capitol Insurance Company ("United"), as well as United's motions to strike, for discovery, and for sanctions against Chance. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

This case arises out of a fire at the Washington Furniture Manufacturing Company on February 7, 1989. United, which paid a substantial claim to its insured as a result of the fire, sought to recover its losses from the

Pontotoc Electric Power Association ("PEPA"), whom United claims was responsible for the fire. On July 31, 1992, United filed a second amended complaint which asserted a cause of action against PEPA for strict liability in tort caused by defective transformer fuses. Although United maintains that it never claimed that any Chance fuses were defective, the second amended complaint plainly states that "the failure of the transformer fuses to blow when confronted with an Electrical malfunction was caused by defective transformer fuses provided and installed by the defendants." The complaint further asserts "the defendant is strictly liable in tort for the plaintiff's injuries and damages caused by the defective transformer fuses... ." Since PEPA used only Chance fuses, it filed a third-party complaint against Chance based on the allegation of defective fuses.[1]

On September 2, 1993, at the deposition of Bill Knight, United's 30(b) (6) representative, Knight stated that he had no knowledge of any defect in the Chance fuses, had never heard anyone express any opinion about a defect in the Chance fuses, and had no report from anyone identifying a defect in the Chance fuses. At that time, counsel for Chance warned counsel for United that if the allegations regarding the defective fuses were not immediately dismissed, Chance would seek sanctions against United and its attorneys. No dismissal by United was forthcoming.

On December 18, 1993, United's expert witness, John Butters, admitted during his deposition that he had no evidence of any failure or defect in the Chance fuses. After Butters' admission, counsel for United stated on the record that it was not thereafter making any claim of a manufacturing defect in the Chance fuses. Based on this stipulation by United, PEPA agreed to dismiss its third-party complaint against Chance.

Chance has now moved for sanctions against United

and/or its attorneys under both Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. Rule 11(b) provides that:

> [b]y presenting to the court.. .a pleading, written motion, or other paper, an attorney. . . is certifying that, to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....

Rule 11 further provides that a violation of section (b) may subject the attorneys, law firms, or parties to appropriate sanctions. 28 U.S.C. § 1927 states that:

> [a]ny attorney.. .who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

For the reasons stated herein, the court finds that the attorneys who signed United's second amended complaint are guilty of violating Rule 11 and § 1927, and therefore are subject to appropriate sanctions.

The issue of sanctions in this matter is rather simple and needs no lengthy analysis. The attorneys for United filed a second amended complaint alleging defective fuses. Despite United's counsels' attempts to recharacterize their claims, the second amended complaint clearly asserts a claim for defective fuses.[2]

Counsel for United has failed to provide, at any time, any evidence of a defective fuse. Both United's 30(b) (6) representative and its expert witness stated that they had no evidence of any defective fuses. It is clear to this court that United's counsel never had any evidentiary support for their allegation of defective fuses. Therefore, the court finds that counsel for United violated Rule 11 when they signed and filed the second amended complaint.

Furthermore, the court finds that in filing the second amended complaint and in refusing to dismiss the claims of defective fuses despite Chance's request to do so, counsel for United violated 28 U.S.C. § 1927. One can see the propensity of United's counsel to unreasonably and vexatiously multiply the litigation by reviewing their actions in response to this motion. The appropriate response would have been to simply provide the court with some evidence with which to reasonably support a claim for defective fuses, such as the report of an expert witness which explains in what manner the fuses were defectively designed and/or manufactured. Instead, counsel for United submitted numerous irrelevant exhibits and filed three motions of its own, none of which have any merit. Therefore, the court finds that counsel for United violated 28 U.S.C. § 1927 by filing the second amended complaint.

United asserts that is should not be subject to sanctions since it did not directly assert a claim against Chance. United maintains that if anyone is sanctioned, it should be PEPA, which filed the third-party complaint against Chance. However, the issues before the court are whether United's counsel had sufficient evidentiary support to assert a claim for defective, fuses, and whether the actions of United's counsel unreasonably and vexatictsly multiplied the litigation. It was the actions of United's counsel that violated Rule 11 and 28 U.S.C. § 1927 and constituted the basis of Chance being brought into this case. Therefore, sanctions

against the attorneys signing United's second amended complaint are appropriate.

As stated above, the court finds that United's motions to strike, for discovery, and for sanctions are without merit and should be denied. The only motion that warrants discussion is the motion to strike. United moves to strike on the grounds that Chance's motion seeks to impose sanctions on counsel for United without specifying which attorney should be sanctioned. Obviously, the attorneys who signed the second amended complaint without proper evidentiary support are the ones who should be sanctioned. United further moves to strike on the grounds that Chance's motion is untimely in that it was filed more than ten days after entry of judgment. However, since this is a motion for sanctions rather than a motion for attorneys' fees, the court finds that the ten-day period provided in Local Rule 15(b) (2) does not apply. The court finds that Chance's motion was filed in a timely manner and should not be stricken.

Under Rule 11, the court has the discretion to sanction either the attorneys or the parties guilty of violating the rule. Since the actions complained of herein appear to be the acts of United's counsel rather than of United itself, the court finds that it is appropriate to sanction the attorneys involved. This decision is consistent with the provisions of 28 U.S.C. § 1927, which provides for the imposition of sanctions against attorneys, but not parties. Furthermore, the court finds that the attorneys to be sanctioned should be the ones who signed and filed United's second amended complaint, charging strict liability for defective fuses.

For the foregoing reasons, the court finds that Dan W. Webb and J. Max Edwards, Jr., are guilty of violating both Fed. R. Civ. P. 11(b) and 28 U.S.C. § 1927. The court further finds that as a reasonable sanction, Webb and Edwards should pay Chance's reasonable attorneys' fees and

expenses incurred because of United's frivolous claim for defective fuses. The parties are given thirty days from the date of this order to reach an agreement as to the exact amount of fees and expenses due as a result of this sanction. If the parties cannot reach an agreement, counsel for Chance may submit an affidavit as to its fees and expenses within forty-five days of this order. Counsel for United may submit an affidavit in response within ten days after service of Chance's affidavit.

AND IT IS SO ORDERED, this, the 21 day of October, 1997.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1]United maintains that PEPA does not know which type of fuse it used in the transformer, if any. However, PEPA has maintained from the start that the transformer was fused with 14 and 21 amp Chance fuses.

[2] Counsel for United maintains that they never claimed any defect in the Chance fuses, but rather that the transformer was defectively fused in that there were no fuses or that the wrong fuses were used. However, the second amended complaint, in asserting a claim for strict liability, clearly states that the fire was caused by "defective transformer fuses" which unambiguously assert that the correct fuses were used but that there was a manufacturing or design defect that caused the fuses not to function properly.

No. 99-60080

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant – Appellee/Cross-Appellant,

VERSUS

DAN W WEBB,
Appellant/Cross Appellee.

Appeal from the United States District Court For the
Northern District of Mississippi

(3:91-CV-19-B)

FILED December 07, 2000

ON PETITION FOR REHEARING EN BANC

Before KING, Chief Judge, REYNALDO G. GARZA and
PARKER, Circuit Judges.
PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition

for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5THCIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Treating the petition for Rehearing En c as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor FED. R. App. P. and 5THCIR. R. 35) , the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

United States Circuit Judge

No. (3:91-CV-19-B)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED CAPITOL INSURANCE COMPANY,
Plaintiff,

VERSUS

PONTOTOC ELECTRIC POWER ASSOCIATION,
Defendant/Third Party Plaintiff,

VERSUS

A B CHANCE COMPANY,
Third Party Defendant,

FILED October 22, 1997

AFFIDAVIT OF JERRY A. DAVIS

PERSONALLY appeared before me the within named, Jerry A. Davis, who stated upon oath as follows:

1. I am over 21 and otherwise competent to state these matters of fact which are stated upon my personal knowledge.

2. I am a United States Magistrate Judge with offices located at 301 West Commerce Street, Suite 225, P. 0. Box 726, Aberdeen, MS.

3. I was the magistrate judge handling discovery

matters and non-dispositive motions during discovery in United Capital Insurance Company v. Pontotoc Electric Power Association, Civil Action No: 3:91CV19-B-D.

4. In a conference held in my office prior to the time that Pontotoc Electric Power Association filed its third party complaint bringing A.B. Chance into this case, the nature of the claims that were made in a proposed amended complaint on behalf of United Capital were discussed by me with counsel. This conference was not recorded so this affidavit is given to document my remembrance of the conference.

5. During the course of that meeting, I specifically asked Dan Webb, one of the attorneys for United Capital Insurance Company, whether any claims being made in the proposed amended complaint by United Capital was for purposes of asserting any claim against A.B. Chance.

6. I specifically recall that Mr. Webb advised the court at that time that no such claim was being made.

7. I also recall that Mr. Webb went on to explain at that time that United Capital's claim for defective fuses was based entirely on what PEPA had done and what it had put upon the transformer bank.

8. By the time that the matter concerning sanctions was brought to my attention, I had discarded my office file because the case, from the standpoint of my involvement, was over.

9. Specifically, I do not recall if I made detailed notes concerning these discussions, but consistent with my routine habit, my practice has always been to make notes on a form that I use for that purpose to reflect what transpired at such conferences.

10. It was only after this meeting that I signed an

order allowing both the amendment to the complaint and, as a result of the desires of Pontotoc Electric, the filing of the third party complaint which was against A.B. Chance.

11. Mr. Webb advised both the court and all those present at the date of this conference, which was before the amended complaint, which is the subject of the motion for sanctions, and the third party complaint were filed, that the proposed amended complaint did not allege any claim based on any A.B. Chance product.

12. This statement was made to the court and in front of all counsel present which included Messrs. Turnage and Sanders on behalf of Pontotoc Electric and Mr. Edwards also representing United Capital Insurance Company at that time with Mr. Webb.

13. I understood at that time that Mr. Webb took the position on behalf of his client that no claim against any A.B. Chance product was being made as a basis for any product liability claim in this case.

FURTHER, AFFIANT SAYETH NOT.

JERRY A. DAVIS

Sworn to and subscribed before me this 9th day of April, 1998.

Judy K. Jones, Deputy Clerk

(COURT SEAL)